No. 88-6546

MOTION FILED OCT 6 1989

In The

Supreme Court of the United States

October Term, 1989

ALBERT DURO

v. *Petitioner,*

EDWARD REINA
Chief of Police, Salt River Dept. of Public Safety, Salt River Pima-Maricopa Indian Community; and the Hon. RELMAN R. MANUEL, Sr., Chief Judge of the Salt River Pima-Maricopa Indian Community Court,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE ROSEBUD SIOUX TRIBE, THE UPPER SKAGIT INDIAN TRIBE, THE NORTHERN ARAPAHOE TRIBE OF THE WIND RIVER RESERVATION, THE ASSINIBOINE & SIOUX TRIBES OF THE FORT PECK RESERVATION, THE COLORADO RIVER INDIAN TRIBES, THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION, THE GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS, THE LUMMI TRIBE, THE QUINAULT INDIAN NATION, THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, THE SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, THE TULALIP TRIBES, THE WINNEBAGO TRIBE OF NEBRASKA AND THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS IN SUPPORT OF RESPONDENTS

JERILYN DECOTEAU*
ROBERT T. ANDERSON
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Attorneys for the Rosebud Sioux Tribe
*Counsel of Record

EDWARD G. MALONEY, JR.
2284 Community Plaza
Sedro Woolley, WA 98284
(206) 856-5501

Attorney for Upper Skagit Indian Tribe

(Attorneys Continued on Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

JEANNE WHITEING
WHITEING, THOMPSON & WHITE
6684 Gunpark Drive
Boulder, CO 80301
(303) 530-1335

Attorneys for the Northern Arapahoe Tribe of the Wind River Reservation

HARRY SACHSE
SONOSKY CHAMBERS & SACHSE
1250 I Street, N.W.
Washington, D.C. 20005
(202) 682-0240

Attorney for the Assiniboine & Sioux Tribes of the Fort Peck Reservation

JOHN SCHUMACHER
Route 1, Box 23B
Parker, AZ 85344
(602) 669-5271

Attorney for the Colorado River Indian Tribes

MICHAEL TAYLOR
PO Box 150
Nespelem, WA 99155
(509) 634-4711

Attorney for the Confederated Tribes of the Colville Reservation

HOWARD G. ARNETT
MARCEAU, KARNOPP, PETERSON, HUBEL & NOTEBOOM
1026 Bond Street
Bend, OR 97701
(503) 382-3011

Attorney for the Confederated Tribes of the Warm Springs Reservation

WILLIAM RASTETTER
6724 County Road 645
Cedar, MI 49621
(616) 228-6300

Attorney for the Grand Traverse Band of Ottawa & Chippewa Indians

DANIEL RAAS
RAAS, JOHNSON, GARRETT & STUEN
1503 E. Street, Box 5746
Bellingham, WA 98227
(206) 647-0234

Attorney for the Lummi Tribe

AMY CREWDSON
PO Box 189
Taholah, WA 98587
(206) 276-8211

Attorney for the Quinault Indian Nation

DANIEL T. GREEN
206 Greenough Street
Sault Ste. Marie, MI 49783
(906) 635-6050

Attorney for the Sault Ste. Marie Tribe of Chippewa Indians

RICHARD WEST
GOVER, STETSON & WILLIAMS,
1225 Rio Grande Blvd., N.W.
Albuquerque, NM 87104-2630
(505) 842-6961

Attorney for the Shoshone Tribe of the Wind River Reservation

ALLEN H. SANDERS
BELL & INGRAM
PO Box 1769
Everett, WA 98206
(206) 258-6261

Attorney for the Tulalip Tribes

JAMES BOTSFORD
Legal Aid Society
PO Box 37
Walthill, NE 68067
(402) 846-5380

Attorney for the Winnebago Tribe of Nebraska

JACK TROPE
Association on American Indian Affairs
95 Madison Avenue
New York, NY 10016
(212) 689-8720

Attorney for the Association on American Indian Affairs

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE ROSEBUD SIOUX TRIBE, ET AL.

Pursuant to rule 36.3, *amici curiae*, consisting of fourteen federally recognized Indian tribes and the Association on American Indian Affairs, respectfully move this Court for leave to file the attached brief *amici curiae* in support of the Respondent Edward Reina in the above-captioned case. Respondent consents, but Petitioner Albert Duro has not responded to the written and oral

requests for permission to file the brief of *amici* and, therefore, this motion is necessary.

Amici have a substantial interest in the resolution of the issues raised by this case. If this Court denies tribal governments criminal jurisdiction over Indians within their communities, it will seriously handicap their ability to maintain law and order within their reservations. The interest of the *amici* is described more fully in their proposed brief attached to this motion.

Amici submit the attached brief to inform the Court of the substantial effects this Court's decision will have and of the various tribes' interest in maintaining jurisdiction over Indians who are present within their territory and over Indians who are members of their communities.

Dated: October 6, 1989

Respectfully submitted,

JERILYN DECOTEAU
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel of Record for *Amici Curiae*

QUESTION PRESENTED

Whether federal authority has implicitly divested Indian tribes of power to punish criminal acts committed by Indians who reside on the tribes' reservations as part of their Indian communities but who are formally enrolled in other tribes.

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INTERESTS OF AMICI

Amici tribes are fourteen federally recognized tribes with significant numbers of Indians enrolled in other tribes living on their reservations who are well integrated into the tribal community. *Amicus* Association on American Indian Affairs is a national organization that supports Indian rights. Each tribe asserts the authority to exercise criminal jurisdiction over all Indians within its reservation. A decision by this Court foreclosing tribal jurisdiction over Indians present on their reservations, but enrolled elsewhere, will upset long-standing practice and seriously impair law and order on their reservations. *Amici* urge this Court to uphold tribal authority to exercise criminal jurisdiction over Indians, like Albert Duro, who maintain relations with the tribal community. Specific facts pertaining to each of the *amici* tribes are incorporated in the arguments in this brief.

STATEMENT OF FACTS

On June 18, 1984, Albert Duro was charged in the Salt River tribal court with unlawful discharge of a firearm while residing on the Salt River Pima-Maricopa Indian Reservation in Arizona. The complaint alleged that one of two shots discharged fatally wounded Phillip Brown, an enrolled member of the Gila River Pima-Maricopa Indian Community. A federal indictment for murder was returned, but the United States Attorney dismissed the case without prejudice and transferred the custody of Duro to the Salt River Tribe. At the time of the shooting, Duro, an enrolled member of the Torrez-Martinez Band of Mission Indians of California, was maintaining tribal relations with the Salt River Tribal Community – he had lived for several months on the Salt River Reservation with his girlfriend, an enrolled member of the Salt River Tribe, and was working for a tribally-owned construction company. He had previously submitted to the Salt River

tribal court's jurisdiction for an offense unrelated to this case.

SUMMARY OF ARGUMENT

The federal government's treatment of criminal offenses among Indians supports the proposition that Indian tribes retain criminal jurisdiction over all Indians present within their territory. However, this Court need not reach the issue as to *all* Indians since the defendant Duro is indisputably an Indian who was voluntarily maintaining tribal relations with the Salt River Tribe at the time of the alleged offense. He was residing on the Salt River Tribe's reservation with a tribal member and was employed in a tribally owned and operated construction company. In short, he was plainly a voluntary member of the tribal community and, as such, clearly within the class of Indians the federal government assumed would remain under tribal jurisdiction.

ARGUMENT

Upon formation of the United States, Indian tribes were acknowledged "as distinct political communities, having territorial boundaries, within which their authority is exclusive. . . ." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 531 (1832). As this Court stated in *United States v. Wheeler*, 435 U.S. 313 (1978), the powers of Indian tribes are of an inherent nature and prior "to the coming of the Europeans, the tribes were self-governing political communities." 435 U.S. at 322. As "nations" or "sovereign political communities," they had criminal jurisdiction over Indians of other tribes who resided or were present within their territory. Such authority, while not necessarily manifested in formal "criminal" laws, was enforced through informal sanctions and restitution. *See* F. Cohen, *Handbook of Federal Indian Law* 335 (1982). As Felix Cohen observed: "An Indian reservation would be a criminal's paradise were it not for the preventive and punitive

measures of the tribe itself." F. Cohen, *Indian Rights and the Federal Courts*, 24 Minn. L. Rev. 145, 155 (1940).

Once a tribe is acknowledged as possessing a particular attribute of self-government, the inquiry shifts to a review of federal law to determine whether these inherent powers have been limited by specific restrictions in treaties or statutes, or are in "conflict with the interests of [the United States'] overriding sovereignty." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978). This Court described the approach for determining the extent of tribal criminal jurisdiction as based

> principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.

Id. at 206, *quoting DeCoteau v. District County Court*, 420 U.S. 425, 444-445 (1975).

In *Oliphant*, "the common notion[ ] of the day" informing the Court's analysis was that the exercise of tribal criminal jurisdiction over *non-Indians* was, from the outset of the Union, inconsistent with the tribes' dependent status. This notion was revealed upon review of the history of federal-tribal relations gleaned from treaties, Executive Branch action and statutes. Not at issue in *Oliphant*, or in any other Supreme Court case, was the question of tribal authority over Indians not "enrolled" as members in the governing tribe, but who were present in, or part of, a tribal community. A review of the factors considered in *Oliphant* reveals that tribes historically exercised jurisdiction over intra-Indian offenses and that the federal government has not divested such authority.

I. HISTORICAL AND MODERN RESERVATION CIRCUMSTANCES REVEAL EXTENSIVE INTER-TRIBAL INTEGRATION AND THE CONTINUOUS EXERCISE OF CRIMINAL JURISDICTION OVER INDIANS ENROLLED ELSEWHERE.

A. Historically, Tribal Communities Included Indians From Other Tribes Who were Subject to the Criminal Jurisdiction of the Host Tribe.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196-97 (1978), this Court found an absence of any historical assertion of tribal criminal jurisdiction over non-Indians. While the historical evidence regarding tribal jurisdiction over Indians not enrolled in the governing tribe does not speak of legal terms such as "criminal jurisdiction," the picture painted by historians and anthropologists establishes that tribes exercised what we now call "criminal jurisdiction" over all Indians present within their territory. It was against this historical backdrop that statutes dealing with criminal jurisdiction were passed and treaties negotiated. The backdrop is in stark contrast to that which informed this Court's analysis in *Oliphant* with respect to tribal jurisdiction over non-Indians. Indeed, the mixing and visiting among neighboring Indian tribes continues to this day and the commonsense assumption that the host tribe's laws will be followed continues to be valid.

Historically, Indian villages consisted of amalgamations of Indians from various tribes.

> Although every Indian town carried an identifying tribal name, the resident population included people connected with other tribes. . . .[There were] significant minorities in villages of other tribes, the mixed villages notable along the border between neighboring tribes, and multitribal communities that developed during wartime dislocations.

Atlas of Great Lakes Indian History at 4 (1987). For example, in the 18th century, Potawatomi villages contained large

numbers of Ottawa and Ojibwa, and frequently smaller numbers of Sauk and Mesquakie. *Id.* at 63-64. Just prior to the Indian War of 1791-94, the Delaware and Shawnee joined the Miami in their towns at the head of the Maumee River. *Id.* at 87. This pattern of mixing continued in the early 1800's. *Id.* In Michigan's Lower Peninsula in 1830, "[t]ribal populations became increasingly mixed. . . . Members of all three tribes [Ojibwa, Potawatomi and Ottawa] were found on the upper Thornapple River. . . ." *Id.* at 133. The intertribal mixing common to the Great Lakes Region was common in other areas as well.

Historical research shows that while tribes generally occupied discrete territories, to some extent the same areas may have been used jointly and permissively by other tribes. Indian tribes are not, and never have been, uniform, static, homogeneous political groups. *See id.* at 60. Numerous factors led to members of one tribe living with or having significant relations with another tribe. Refuge from enemies was one reason. Marriage between individuals of different tribes was probably the single most common reason for changes in tribal makeup. Marriage outside the tribe was extensive among the Coast Salish groups of the Pacific Northwest Coast. Elmendorf, *Coast Salish Status Ranking and Intergroup Ties*, 27 Southwestern Journal of Anthropology 360 (1971). Another anthropologist who studied the Coast Salish explained that, "[t]he community was linked through ties of marriage and kinship with other communities and these with still others to form a social network with no very clear boundaries." Suttles, *Affinal Ties, Subsistence, and Prestige Among the Coast Salish*, 62 American Anthropologist 296 (1960). Many Northwest tribes, such as the Upper Skagit, had restrictions on the marriage of close relatives and placed a positive value on marriage with a member of another village. Collins, *Valley of the Spirits: The Upper Skagit Indians of Western Washington* 96 (1974). This was

the pattern for the Nooksack, Stillaguamish, Snohomish, Upper Snoqualmie, Swinomish, and Samish villages as well. *Id.* at 98.

Members of neighboring tribes would sometimes come to live with other tribes and participate in aspects of tribal life. For example, in *The Cheyenne Way*, a detailed study of tribal law, the punishment of two sons of a Dakota hunter who had been living with the Cheyennes is recounted. As would be expected, when the youths broke the Cheyenne law of the hunt, they were punished. The Dakota father acquiesced in the Cheyenne action and told his sons: "Now you have done wrong. You failed to obey the law of this tribe." Llewellyn and Hoebel, *The Cheyenne Way* 112 (1941).

Tribal laws were usually not written but were highly formalized and based on customs and usages. The few written histories of tribal laws reveal that Indians from other tribes were bound and protected by the criminal laws of the tribe. The "Cheyenne Law of Killing," as summarized from recorded cases and opinions in *The Cheyenne Way*, provided that the murder of a Cheyenne would result in banishment from the tribe. A "Cheyenne" was defined to include "a resident alien [or captive?] substantially identified with the Cheyennes and notably deserving of the people." *Id.* at 166 (brackets in original).

Thus, historically, tribes exercised criminal jurisdiction over Indians from other tribes who had become part of the tribal community.

B. Federal Policies Underlying the Establishment of Reservations Resulted in the Creation of Intertribal Reservation Communities with Extensive Cultural and Kinship Ties to Other Reservation Communities.

Reservations were set aside as homelands for Indian tribes, at first by treaty and later by executive order. When the federal government began confining tribes to reservations, it did not follow any consistent policy. Many

reservations are home to confederations of several historically related tribes, *e.g.*, Confederated Tribes of the Warm Springs Reservation, Tulalip Tribes of Washington, Colville Confederated Tribes[1], while larger tribes were sometimes broken into several smaller groups and placed on separate reservations. For example, the Sioux Nation, consisting of many bands, originally was placed on the Great Sioux Reservation encompassing the western half of South Dakota and extending slightly into North Dakota and Nebraska. Treaty with the Sioux, Art. 2, 15 Stat. 635 (1868). An 1889 agreement divided the Sioux Reservation into six smaller reservations: Lower Brule, Crow Creek, Cheyenne River, Pine Ridge, Rosebud, and Standing Rock. Ch. 405, § 12, Act of Mar. 2 1889, 25 Stat. 888. As of 1980, significant numbers of Sioux were residing on Sioux reservations other than their own. Bureau of the Census, 1980 Census of Population, "American

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[1] Many treaties provided for the later admission to reservations of other tribes by permission of the resident tribe. For example, typical language provided that the reservation be set aside "for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." Treaty with the Sioux, Art. 2, 15 Stat. 635, 636 (1868). Later, tribes were placed together on the same reservation for the convenience of the federal government. The Shoshone and Arapaho Tribes, for example, were forced to share the Wind River Reservation in spite of the explicit statement in the treaty with the Shōshone Indians that the reservation would be "set aside for the absolute and undisturbed use and occupation of the Shoshone Indians . . . and the United States now solemnly agrees that no persons . . . shall ever be permitted to pass over, settle upon, or reside in" that territory. Treaty with the Eastern Band Shoshoni and Bannock, Art. 2, 15 Stat. 673 (1868); *see United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938).

Indians, Eskimos, and Aleuts on Identified Reservations and in the Historic Areas Of Oklahoma (Excluding Urbanized Areas)," Vol. 2, Table 4 (1986) (hereinafter 1980 Census). Historically, these Sioux bands shared the same social, religious and political institutions. They still do. It would defy logic and common sense to preclude the exercise of criminal jurisdiction by one modern Sioux tribe over the members of another while present on each other's reservations.

Thus, many present-day reservations are home to tribes that descended from numerous historically semi-autonomous bands or groups, or to confederations of tribes interrelated by extensive kinship ties. These patterns of kinship and shared cultures continue to the present, resulting in large numbers of Indians living on or visiting reservations where they are not enrolled. For example, the Confederated Tribes of the Warm Springs Reservation includes descendants of seven bands of Sahaptin and Wasco-speaking Indians who lived along the Columbia River and its tributaries.[2] Many Northwest tribes, such as the Lummi, Quinault and Upper Skagit, are descended from several ancestral groups. Members of these amalgamated tribes have strong ties to other tribes which frequently share the same ancestry.

This pattern holds true in other regions as well. For example, the Sault Ste. Marie Chippewa Tribe and Grand

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[2] These bands were closely related by language, culture and religion with yet other Sahaptin and Wasco-speaking Indians to the north who later became part of the Yakima Indian Nation, and to the east who became part of the Confederated Tribes of the Umatilla Indian Reservation and the Nez Perce Tribe of Idaho. Also settled at Warm Springs is a group of Paiute Indians who are closely related to northern Paiutes on the Burns Paiute Reservation in Oregon, the Fort McDermott Paiute-Shoshone Reservation on the Oregon/Nevada border and other Paiute reservations and colonies throughout Nevada, northern California and southern Idaho.

Traverse Band of Ottawa and Chippewa Indians in Michigan include descendants of several ancestral bands. Historically, the Ottawa and Chippewa were small groups that gathered in larger bands seasonally for certain purposes such as spring maple sugaring and summer fishing encampments along the Great Lakes. *See Atlas of Great Lakes Indian History* 5 (1987). The amalgamation of these tribes occurred gradually and naturally, based in part on common cultural traditions, living in close proximity, and the tendency of the federal government to define them as a single unit. The result has been, in the Great Lakes Region as in the Pacific Northwest, that Indians are often eligible for enrollment in more than one tribe. For example, virtually all of the members of the Bay Mills Indian Community, a federally recognized tribe in Michigan, are eligible to enroll in the Sault Tribe. The Colville Confederated Tribes regularly processes applications for enrollment for Indians previously enrolled elsewhere, and applications for relinquishment of enrollment for Indians who wish to enroll in another tribe.

Because of historical ties and federal policies, intermarriage between members of different tribes is common.[3] These intermarried couples may have children who may be enrolled in the local tribe or may be enrolled in another tribe. The result is that many, if not most, of the Indians living on reservations not their own are related to enrolled tribal members by blood or marriage. For example, over 1000 current enrolled members living at Fort Peck each has a parent who is enrolled in another tribe.

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[3] On the Colorado River Reservation, 23% of the Indians enrolled elsewhere are married to enrolled members. On the Colville Reservation, 25% of the Indians enrolled elsewhere have become part of a Colville family through marriage or adoption. On the Warm Springs Reservation, approximately 370 of the 500 Indians enrolled elsewhere (more than 70%) are married to enrolled members.

C. Implementation of the Trust Responsibility Has also Encouraged Intertribal Reservation Communities.

Implementation of the federal trust responsibility has fostered extensive tribal integration and has made the exercise of criminal jurisdiction over all Indians who are part of the tribal community even more critical. For example, Indian preference in hiring, required by federal law, has encouraged Indians to work for tribes other than their own. The Indian Reorganization Act (IRA) of 1934, accords an employment preference for qualified Indians in the Bureau of Indian Affairs (BIA). 25 U.S.C. § 472.[4] The preference requirement applies to the Indian Health Service (IHS), *see Preston v. Heckler*, 734 F.2d 1359 (9th Cir. 1984), and to all federal programs administered by tribes under self-determination contracts. Indian Education and Self-Determination Act of 1975, 25 U.S.C. § 450e. The result of the employment preference has been the "presence on most Indian reservations of Indians who are not members of the local tribe." *Miller v. Crow Creek*, 12 Ind. L. Rep. 6008, 6009 (Intertribal Ct. App. 1984).

Federal services, administered for the most part on reservations by the BIA, IHS or through a self-determination contract with a tribe, are available to *all federally recognized Indians* on any federal reservation. These services encourage large numbers of Indians enrolled in other tribes to move to or visit reservations not their own. This creates added burdens for the tribes in the administration and provision of the full range of governmental services – not the least of which is police protection. For example, 1,136 members of other federally recognized tribes living on or near the Tulalip Reservation depend on the Tulalip tribal government to provide medical, housing, and other assistance

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[4] Indian preference has been upheld against a challenge that such a preference constitutes racial discrimination. *Morton v. Mancari*, 417 U.S. 535 (1974).

pursuant to federal Indian programs. On the Colville Reservation, the Indian Health Service Clinic recorded 5,502 visits by enrolled Colville tribal members and 2,231 visits by Indians enrolled elsewhere during one year.

The federal allotment policy, combined with extensive intertribal marriage and inheritance by successive generations, has resulted in substantial property holdings on reservations by Indians who are members of other tribes. *Cf. Hodel v. Irving*, 481 U.S. 704 (1987). A 1958 study by the BIA revealed that 73% of the 350,000 allottees studied owned an interest in an allotment on a reservation governed by a tribe other than their own. Hearing on H. J. Res. 158, before the Senate Select Committee on Indian Affairs, 98th Cong. 2d. Sess. 9 (1984).[5] As beneficial owners of reservation trust lands, Indians who are enrolled in other tribes have significant interest and involvement in activities on the reservation and are similarly situated to the enrolled members who have interests in reservation trust lands.

D. Present Reservation Circumstances Necessitate the Exercise of Tribal Criminal Jurisdiction Over All who are Part of the Tribal Community.

1. Under modern tribal policies, Indians not enrolled in the local tribe participate as members in tribal social, cultural and political activities.

The most recent federal census demonstrates the large numbers of Indians who reside on the various reservations, but are enrolled elsewhere. 1980 Census, Table 4, *supra*. On average, thirteen percent (13%) of the resident

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[5] For example, over 4,500 Indians enrolled elsewhere own interests in Indian trust lands within the Colville Reservation. Approximately 116 Indians enrolled elsewhere own interests in trust allotments on the Warm Springs Reservation. On the Quinault Reservation, allotments of surplus lands were made to members of other Washington coastal tribes.

Indian population are not enrolled in the local tribe(s).[6] Indians enrolled in other tribes usually receive tribal services and participate in the tribal community on the same basis as enrolled members. For example, the Tulalip Tribes' nutrition program is available to Indians of other tribes who have lived on the reservation a substantial period of time. At Fort Peck, all Indians are eligible to receive assistance from the tribal housing program and 170 tribal housing units are occupied by Indians enrolled elsewhere. Tribal schools and tribal colleges are open to all Indians.

Many tribes give employment preference to enrolled members and Indians enrolled elsewhere over non-Indians.[7] For example, the Tulalip Tribes, requires all employers on the reservation to give preference to members of any federally recognized tribe in hiring, promotion, training, contracting and subcontracting. This encourages large numbers of Indians to live and work on reservations where they are not enrolled.[8]

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[6] For the *amici* tribes, the 1980 Census shows the following percentages of Indians from other tribes in the total resident Indian population: Fort Peck Reservation – 17% of 4,246; Colville Confederated Tribes – 13% of 3,568; Rosebud Sioux Reservation 24% of 5,643; Warm Springs Reservation -- 14% of 1,991; Colorado River – 22% of 1,967; Lummi – 11% of 1,259; Tulalip Tribes – 10% of 763; Quinault – 12% of 944; Winnebago – 46% of 1,098; Wind River – 22% of 4,147.

[7] The following *amici* tribes afford a hiring preference to all Indians over non-Indians: Confederated Tribes of the Warm Springs Reservation, Lummi Tribe, Sault Ste. Marie Tribe of Chippewa Indians, Tulalip Tribes, Colville Confederated Tribes and Winnebago Tribe. The Colville Indian preference law gives its enrolled members first priority. Colville Tribal Plan of Operation 45.1(c) 2.

[8] The Winnebago Tribe has 122 Indian employees, of whom 25 are enrolled elsewhere. The Colville tribal government employs 75 Indians enrolled elsewhere. The Colville

(Continued on following page)

Indian reservation residents enrolled in other tribes and guests from other tribes participate fully in religious and social functions. Many tribal members, for example, participate in a regular and continual circuit of tribal traditional ceremonies; in hunting, fishing and gathering expeditions; in celebrations, dances, pow wows, and religious ceremonies; and, in sports (basketball, baseball, softball, rodeo, stick games) which provide year round formal and informal bases for the Indians of one reservation to travel to all the other reservations in the region. The length of stay ranges from weekend tournaments to multi-week encampments. Many tribes increase their police force for special events to handle increased incidents requiring law enforcement efforts. For example, the Warm Springs Reservation has 12,000 Indian visitors annually for pow-wows, traditional celebrations, the tribal fair, all-Indian sporting events, funerals and memorials, as well as private family and social visits. Significant numbers of criminal incidents occur during social events such as the Warm Springs Reservation's June tribal fair and the Christmas basketball tournament. The Fort Peck Reservation hosts six four-day events between June and August each year. Up to eight additional law enforcement officers are hired for each event.

As the above discussion shows, Indians present on the reservation, who are members of other tribes, are well integrated into the tribal community.

2. Tribes generally assert civil and criminal jurisdiction over Indians on their reservation who are enrolled in other tribes.

Tribal courts almost universally assert civil and criminal jurisdiction over all Indians within the tribes'

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tribal executive director, the highest administrative office, is enrolled in the Sioux Tribe of the Pine Ridge Reservation. The Colville tribal police chief is enrolled in the Yakima Tribe. The Fort Peck tribal industry employs 360, 70 of whom are Indians enrolled in other tribes.

jurisdiction. "Native American Tribal Court Profiles 1985" (Report by the Bureau of Indian Affairs Branch of Judicial Services profiling 144 tribal courts).[9] In many tribes, sitting judges are Indians enrolled elsewhere. For example, 90% of Colville Confederated Tribes' *pro tem* trial panel of judges brought in to try cases where none of the local judges may sit, are members of other tribes. In addition, 70% of the judges appointed to the Colville Tribal Appellate Court are members of other tribes. In many tribes, service on juries is not limited to enrolled members.[10]

All of the *amici* tribes assert the authority to exercise criminal jurisdiction over all Indians present within their reservations. Statistics provided by *amici* demonstrate the impact in the tribal community of Indians enrolled elsewhere: Colorado River Tribes – 462 arrests of Indians enrolled elsewhere during the past five years; Confederated Tribes of the Warm Springs Indians Reservation – during 1988 alone, 324 out of 1385 criminal cases in tribal court involved Indians enrolled elsewhere; Lummi – in 1988 about 100 crime related calls involved non-Lummi Indians; Upper Skagit Tribe – from 1984 through May of 1989, 77 of 271 tribal court criminal cases involved Indians enrolled elsewhere; Winnebago Tribe – 91 criminal cases involved Indians enrolled elsewhere during 1989; Wind River – 500 prosecutions of Indians enrolled elsewhere in last five years. At the Rosebud Reservation

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[9] Of all the tribal courts profiled, only one that asserted criminal jurisdiction expressly limited its jurisdiction to members – the Judicial System of the Hannaville Indian Community in Menominee County, Michigan.

[10] For example, all adult residents of the Colville Reservation are eligible to be called for jury duty, CTC § 4.2.01; all registered state voters of the Lummi Reservation may be called as jurors, Lummi Law and Order Code 1.5.01; the Upper Skagit Law and Order Code provides that service on juries is not limited to enrolled members; and, any Indian may sit on juries in the Winnebago Tribal court system.

the criminally accused, whether enrolled at Rosebud or not, are entitled to a public defender without cost.[11]

In most cases neither local county prosecuting attorneys nor the United States attorneys make any distinction between enrolled members and other Indians when they refer Indians to the tribes for prosecution. A determination that tribes lack jurisdiction over Indians enrolled elsewhere would undermine effective law enforcement by negating the tribes' authority and complicating existing arrangements for cooperation with other local agencies. In fact, in the vast majority of the cases, the assertion of criminal jurisdiction appears to go unchallenged. As the Ninth Circuit said in the case at hand "[t]his case brings before us an issue of first impression. . . ." *Duro v. Reina*, 851 F.2d 1136, 1139 (9th Cir. 1988).[12] For this Court to find that such jurisdiction does not exist would cause an upheaval of uncalculated proportions in the existing criminal justice system and may leave a jurisdictional void that, as a practical matter, other sovereigns will not fill. Furthermore, most reservations are located in isolated areas, far from state or federal law enforcement agencies that have little interest in law enforcement on reservations. As a practical matter, tribal police and court systems are the only ones available in Indian country.

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[11] Any Indian prosecuted in tribal court would of course be provided the constitutional protections embodied in the Indian Civil Rights Act. 25 U.S.C. § 1302.

[12] One published tribal court opinion discussed the issue finding in favor of tribal court jurisdiction, but dismissed the case on other grounds. *Miller v. Crow Creek Tribe*, 12 Ind. L. Rep. 6008, *supra*.

II. INDIAN TRIBES RETAIN INHERENT CRIMINAL AUTHORITY OVER ALL INDIANS PRESENT WITHIN THEIR TERRITORY.

A. Statutory Approaches to Tribal Criminal Jurisdiction Indicate No Distinction Based on Membership in any Particular Tribe.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197-99, this Court found that the assertion of federal jurisdiction over crimes by non-Indians in Indian country immediately after formation of the Union was persuasive evidence of Congress' intent to take away any tribal authority over non-Indians. The converse is true with regard to Indians within tribal territory, where Congress was careful from the outset to exempt from federal jurisdiction all crimes between Indians – without regard to which tribe the Indians belonged. This legislative approach reflected the reality that tribes continued to utilize their traditional customs and usages for controlling the behavior of all Indians present within their territory.

The earliest trade and intercourse acts provided for the punishment of non-Indians who committed crimes in Indian territory. The Trade and Intercourse Act of 1790 provided that citizens who committed crimes against Indians would be punished pursuant to the law of the "state or district to which he or they may belong." 1 Stat. 137, 138 (1790). Since Indians were not generally citizens until 1924, this and other statutes that followed had the effect of excluding from their coverage crimes by Indians against Indians. F. Cohen, *Handbook of Federal Indian Law* 287 n.54 (1982 ed.).

The first version of the Indian General Crimes Act, codified as amended at 18 U.S.C. § 1152, provided for federal jurisdiction over crimes committed by Indians or non-Indians if such actions would be a crime if committed in any federal enclave. Act of March 3, 1817, 3 Stat. 383. An important exception was enumerated, however,

so that federal jurisdiction would not lie for "any offence committed by one Indian against another, within any Indian boundary." *Id., reenacted in* Act of June 30, 1834, ch. 161, 4 Stat. 729, 733. In *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), a non-Indian who alleged he was adopted into the Cherokee Tribe claimed that his prosecution was barred under the proviso to the Non-intercourse Act, Act of June 30, 1834, 4 Stat. 729. *Id.* at 572. The Court held he was not an Indian within the meaning of the Act and, more importantly, for the issue here, that the intent of the Act was to leave Indians *"as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs." United States v. Rogers*, 45 U.S. at 572 (emphasis added). *See United States v. Quiver*, 241 U.S. 602, 604 (1916) (At an early period it became the settled policy of Congress to permit . . . offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws.)

Indeed, this Court affirmed this view in *Oliphant* when it stated that the " 'general object' of the congressional statutes was to allow Indian nations criminal 'jurisdiction of all controversies between Indians . . . and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side.' " *Oliphant*, 435 U.S. at 204, *quoting In re Mayfield*, 141 U.S. 107, 115-116 (1891).

This approach was followed by the federal government for over 100 years after formation of the United States. Even when this uniform policy was abandoned, however, the United States carefully limited its assumption of jurisdiction. The Indian Major Crimes Act, codified as amended at 18 U.S.C. § 1153, was adopted in the aftermath of *Ex parte Crow Dog*, 109 U.S. 556 (1883), in which this Court held that there was no federal jurisdiction for prosecution of a murder of one Indian by another within the Indian country. *See United States v. Kagama*, 118 U.S. 375, 382-383 (1886). The act enumerated several crimes which, if committed by an Indian against the

person or property of another Indian, would be punishable in the federal courts. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 385. Congress no doubt could have distinguished on the basis of membership, but did not. This is in direct contrast to the federal government's early assumption of jurisdiction over crimes by non-Indians within Indian territory. This distinction from the treatment of non-Indians is consistent with the conclusion that tribes possess inherent authority over all Indians within their territory.

This approach reflected "a recognition that it would be unfair to apply white men's standards of justice to interactions exclusively between Indians, who belonged to a separate culture." *Oliphant v. Schlie*, 544 F.2d 1007, 1015 (9th Cir. 1976) (Judge Kennedy dissenting), *rev'd*, 435 U.S. 191 (1978). It follows from this reasoning that Indians enrolled with other tribes, but present within the tribal territory, should be subject to tribal, rather than state, jurisdiction. They are Indians who are recognized as such and thus are beyond the reach of state authority. *Donnelly v. United States*, 228 U.S. 243 (1913).

As shown in section I above, Indians enrolled in other tribes stand on significantly different footing than non-Indians. Contrary to the Court's assertion in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161 (1980), Indians present within a tribe's jurisdiction in fact are treated differently than non-Indians. They have a special status under the law as federally recognized Indians. Moreover, unlike the situation in *Colville*, this is not simply an attempt to market a tax exemption. This Court in *Colville* found the tribal interest in marketing a tax exemption to be insignificant. In this case, the tribes seek to advance their critical interest in maintaining law and order on their reservations.[13]

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[13] Moreover, *Colville* is inapposite for another reason. This Court addressed the issue of *the State of Washington's civil*

(Continued on following page)

Reliance should not be placed upon formal enrollment in the governing tribe, which is a modern creature of the BIA designed to ease administration of federal programs for Indians. F. Cohen, *Handbook of Federal Indian Law* 356 n.76 (1982 ed.). Indians may be members of an Indian community for many purposes and still not be formally enrolled. *Id.* Enrollment may be a useful criterion for determining that a person is an Indian, and for determining rights to distribution of property or other federal or tribal benefits, *id.*; F. Cohen *Handbook of Federal Indian Law* at 133 (1942 ed.), but its usefulness breaks down when it becomes an artificial limit on a tribe's ability to maintain law and order in its community.[14] The artificiality of enrollment is most vivid in light of the makeup of local tribal communities. *See* pp. 25-27, *infra*.

(Continued from previous page)

authority to tax the Yakima Nation's sale of cigarettes to "Indians resident on the reservation but not enrolled in the governing Tribe." 447 U.S. at 160. The Court concluded that the state could exercise its civil jurisdiction because there were no countervailing tribal interests which were affected. At the same time, however, it is clear that the Tribe retained taxing jurisdiction over the non-member Indians, notwithstanding the fact that Washington could exercise concurrent jurisdiction. *Id.* at 152-153. Accordingly, nothing in the Court's holding or analysis speaks to the issue of criminal authority over Indians enrolled elsewhere present within tribal territory.

[14] While it is a civil statute, the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963, also reflects the federal policy of leaving jurisdiction over all Indians to the tribes. Under the ICWA, a tribe has exclusive jurisdiction over any child custody proceeding involving an Indian child who is domiciled on that tribe's reservation. 25 U.S.C. § 1911(a). No distinction is made between enrolled members and other Indians. In addition, the ICWA provides for adoptive placement of Indian children, in order of preference, with (1) a member of the child's extended family, (2) other members of the child's tribe, or (3) other Indian families. 25 U.S.C. § 1915(a). *See generally, Mississippi Band of Choctaw Indians v. Holyfield*, ___ U.S. ___, 109 S. Ct. 1597 (1989).

B. Treaties and Executive Branch Actions Reflect the Assumption that Crimes Involving only Indians were Subject to Tribal Jurisdiction.

The treaties executed by the United States and the tribes also reflect an understanding that the tribes retained criminal authority over all Indians present within their territory. In *Oliphant*, this Court reviewed the history of early treaties with certain tribes and found that tribal jurisdiction over offenses committed by non-Indians was generally precluded, as evidenced by occasional requests in Congress that a tribe be granted such criminal jurisdiction. 435 U.S. at 197-198. The Choctaw Tribe, for example, had included a provision in their treaty which affirmatively requested that the United States Congress "*grant* to the Choctaws the right of punishing by their own laws any white man who shall come into their Nation, and infringe any of their national regulations." *Id.* (citation omitted) (emphasis added). There was a consistent pattern pursuant to which the federal government asserted exclusive jurisdiction over crimes committed by or against non-Indians throughout tribal territory. *Oliphant*, 435 U.S. at 204. Indeed, "[u]ntil 1855 treaties did not generally provide a forum for the trial of intra-Indian or intra-tribal crimes, the prevailing assumption apparently being that such crimes were within the exclusive province of tribal self government." R. Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 Ariz. L. Rev. 951, 955.[15] At the

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[15] There were provisions in isolated treaties, however, which granted federal jurisdiction over Indians who committed "depredations" against other Indians. Taken in context, however, it seems clear that the federal government's interest was in preventing hostile acts which might lead to war among the tribes, rather than to usurp traditional tribal criminal authority over individual Indians who were part of the tribal community. *See, e.g.*, Treaty with the Snakes, Art. 4, 14 Stat. 683 (1865).

same time, it is apparent that the federal government was aware that tribal territory often included Indians who belonged to other than the host tribe. *See* treaties discussed in section III, *infra*.

An 1883 attorney general's opinion, which considered federal prosecution of an Indian of one tribe who murdered an Indian of another tribe on a third tribe's reservation, concluded that only a tribal court prosecution was possible. 17 Op. Atty. Gen. 566 (1883). The Opinion advised that federal prosecution would not lie because of the Indian *versus* Indian nature of the crime and that "unless demand for [the Indian defendant's] surrender shall be made by one or other of the tribes concerned," he would have to be released. *Id.* at 570. This is in direct contrast to the opinions relied on by this Court in *Oliphant* which specifically state that tribes lack jurisdiction over non-Indians. *Oliphant*, 435 U.S. at 199. Thus, the only authority speaking to the precise fact situation involved in the case at bar concluded that tribal authority extended over Indians of other tribes.

In his opinion on the "Powers of Indian Tribes," the Solicitor for the Department of Interior assumed that tribes retained jurisdiction over criminal activities by any Indians within tribal territory. As he stated:

> So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. It might punish the subjects for offenses against each other or against aliens and for public offenses against the peace and dignity of the tribe. *Similarly, it might punish aliens within its jurisdiction according to its own laws and customs.* Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.

Powers of Indian Tribes, 55 I.D. 14, 57 (1934) (emphasis added).[16] Consistent with the assumption that tribes have jurisdiction over alien Indians in their territory, in 1883 the Bureau of Indian Affairs established Courts of Indian Offenses which today exercise criminal jurisdiction over any Indian who is a member of any recognized tribe. 25 C.F.R. § 11.2(c). The jurisdiction of these courts extended to any Indian "who is a member of any recognized tribe now under federal jurisdiction." Law and Order Regulations, ch. 1, § 1 (Nov. 27, 1935), originally codified at 25 C.F.R. 161.1 – 161.306. While these courts were once described as educational, they are now viewed as exercising residual tribal powers. *See* F. Cohen, *Handbook of Federal Indian Law* at 251 (1982 ed.) *citing United States v. Clapox*, 35 F. 575, 577 (D. Or. 1888) and *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956); and 55 I.D. at 64. Regardless of their original purpose, however, the important point is that the federal government determined it appropriate to subject all Indians to the jurisdiction of these courts.

Hence, the actions of Congress and the Executive Branch, and the cases interpreting them, all reflect the common assumption of all three branches of the federal government that Indian tribes retained criminal jurisdiction over all Indians within their territory. Moreover, historical and anthropological evidence supports the conclusion that tribes necessarily, and in fact, exercised criminal jurisdiction over all Indians within their territory. At minimum, however, tribes certainly exercised and retained jurisdiction over Indians who, like Duro, became part of the tribal community.

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[16] This Court in *Oliphant* interpreted federal statutes and treaties as divesting tribal authority over non-Indians, but that holding does not undercut the common assumption that tribes had inherent jurisdiction over alien Indians within their territory.

III. TRIBES RETAIN INHERENT CRIMINAL AUTHORITY OVER ALL INDIANS WHO MAINTAIN RELATIONS WITH THE TRIBAL COMMUNITY.

As shown above, tribes historically exercised criminal jurisdiction over all Indians present in their territory and the federal government purposefully left offenses involving Indians only to tribal jurisdiction. The federal government asserted no jurisdiction over such offenses until 1885. The logical inference is that tribes retained jurisdiction over all Indians present within their territory regardless of tribal affiliation.

The facts of this case, however, present the narrower issue of whether an Indian enrolled elsewhere, who resides on a reservation and maintains relations with the tribal community, can be prosecuted by the local tribe for a crime he commits on the reservation. An examination of the legal, social and political aspects of tribal communities shows that Indian tribes retain the inherent authority to prosecute such Indians as they would any other tribal member. *See United States v. Wheeler*, 435 U.S. 313 (1978).

The earliest pronouncements of Chief Justice John Marshall referred to tribes "as distinct political communities, having territorial boundaries, within which their authority is exclusive. . . ." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 531 (1832). In *United States v. Montoya*, 180 U.S. 261, 266 (1901), the Court defined "tribe" as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." This notion of tribes as "communities" was continued in *United States v. Sandoval*, 231 U.S. 28 (1913), where the Court found that the Indian pueblos in New Mexico were Indian country for purposes of federal criminal jurisdiction because they were "dependent Indian communities." *Id.* at 46. Congress later codified that language as an

additional term of place to describe Indian country. *See* 18 U.S.C. § 1151(b).

Many early treaties reflect the understanding that tribal communities were diverse and tribes had the power to control all those within their territory who were considered to be part of the tribal community. The Cherokee Nation, secured the right "to make and carry into effect such laws as they deem necessary for the government and protection of the persons and property within their own country belonging to their people *or such persons as have connected themselves with them.*" Treaty with the Cherokee, Art. 5, 7 Stat. 478 (1835) (emphasis added). The Treaty with the Choctaw provided: "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of *all the persons and property that may be within their limits. . . .*" Art. 4, 7 Stat. 333 (1830). Treaty provisions requiring tribes to "deliver up" any Indian who has committed a capital crime against whites or citizens support the understanding that tribes have jurisdiction over any Indian against Indian crime in their communities. *See, e.g.*, Treaty with the Shawnees, Art. III, 7 Stat. 26 (1786), "any Indians of the Shawnee Nation *or other Indians residing in their towns* who commit murder or robbery 'or do any injury' to the United States;" and Treaty with the Creeks requiring delivery to the United States of any Creek Indian *"or person residing among them"* who commits a capital crime against a citizen of the United States. Art. 8 & 9, 7 Stat. 37 (1790) (emphasis added).

This concept of tribal community has also been used in the Court's definition of who is an Indian for purposes of federal Indian criminal statutes. In *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977), the Court noted that among the lower federal courts "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations

with the Indians thereon.' " *Quoting Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938); *see also, United States v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974) (dictum), *vacated on other grounds*, 421 U.S. 944 (1975). In *Ex parte Pero*, 99 F.2d 28, 31 (7th Cir. 1938), the court said: "We are convinced that the overwhelming weight of authority, both judicial and statutory, requires the conclusion that a child of an Indian mother and half-blood father . . . who himself lives on the reservation and maintains tribal relations and is recognized as Indian, is to be considered an . . . 'Indian' as used in the [criminal] jurisdictional statute in question. The lack of "enrollment . . . is not determinative of status." In *United States v. Ives*, 504 F.2d 935, 953 (9th Cir. 1974), *vacated on other grounds*, 421 U.S. 944 (1975), the court said, "[e]nrollment or lack of enrollment is not determinative of Ive's status as an Indian." The court found, without reciting it, substantial evidence in the record sufficient for a jury to find Ives was an Indian. In *United States v. Mazurie*, 419 U.S. 544, 557 (1975), the Court ruled that Indian "tribes . . . are a good deal more than 'private, voluntary organizations.' " The reality of present day tribal communities reveals that they consist of all Indians who are part of the community, not just of those who are technically enrolled Indians.

A defendant's recognition as an Indian by the tribal community has been held a sufficient basis for conferring federal criminal jurisdiction over him.

> Courts have generally followed the test first discussed in *United States v. Rogers*, 45 U.S. 567 (1845): in order to be considered an Indian, an individual must have some degree of Indian blood and must be recognized as an Indian. . . . In determining whether a person is recognized as an Indian, courts have looked to both recognition by a tribe or society of Indians or by the federal government.

United States v. Dodge, 538 F.2d 770, 786-787 (8th Cir. 1976), *cert. denied, sub nom. Cooper v. United States*, 429 U.S. 1099 (1976) (emphasis added). Thus, while tribal

"[e]nrollment is the common evidentiary means of establishing Indian status, . . . it is not the only means nor is it necessarily determinative." *United States v. Broncheau*, 597 F.2d 1260, 1262-63 (9th Cir. 1979), *cert. denied*, 444 U.S. 859 (1979). *See also*, F. Cohen, *Handbook of Federal Indian Law* at 2-5 (1982 ed.).

An Indian who maintains relations with a given tribal community is a member of that tribe as much as, and sometimes more than, an Indian who is technically enrolled there. To treat such an Indian differently from an enrolled member for purposes of tribal criminal jurisdiction fails to recognize the history and present circumstances of tribal communities, as well as the longstanding legislative scheme for the division of prosecutorial authority in Indian country.

CONCLUSION

The federal government's treatment of criminal offenses among Indians supports the proposition that Indian tribes retain criminal jurisdiction over all Indians present within their territory. However, this Court need not reach the issue as to *all* Indians since the defendant Duro is indisputably an Indian who was voluntarily maintaining tribal relations with the Salt River Tribe at the time of the alleged offense. He was residing on the Salt River Tribe's reservation with a tribal member and was employed in a tribally owned and operated construction company. In short, he was plainly a voluntary member of the tribal community and, as such, clearly within

the class of Indians the federal government assumed would remain under tribal jurisdiction.

Respectfully submitted,

JERILYN DECOTEAU*
ROBERT T. ANDERSON
Native American Rights Fund
1506 Broadway
Boulder, CO 80302

Attorneys for the Rosebud Sioux Tribe

JEANNE WHITEING
WHITEING, THOMPSON & WHITE
6684 Gunpark Drive
Boulder, CO 80301
(303) 530-1335

Attorneys for the Northern Arapahoe Tribe of the Wind River Reservation

HARRY SACHSE
SONOSKY CHAMBERS & SACHSE
1250 I Street, N.W.
Washington, D.C. 20005
(202) 682-0240

Attorney for the Assiniboine & Sioux Tribes of the Fort Peck Reservation

JOHN SCHUMACHER
Route 1, Box 23B
Parker, AZ 85344
(602) 669-5271

Attorney for the Colorado River Indian Tribes

EDWARD G. MALONEY, JR.
2284 Community Plaza
Sedro Woolley, WA 98284
(206) 856-5501

Attorney for Upper Skagit Indian Tribe

MICHAEL TAYLOR
PO Box 150
Nespelem, WA 99155
(509) 634-4711

Attorney for the Confederated Tribes of the Colville Reservation

HOWARD G. ARNETT
MARCEAU, KARNOPP, PETERSON, HUBEL & NOTEBOOM
1026 Bond Street
Bend, OR 97701
(503) 382-3011

Attorney for the Confederated Tribes of the Warm Springs Reservation

WILLIAM RASTETTER
6724 County Road 645
Cedar, MI 49621
(616) 228-6300

Attorney for the Grand Traverse Band of Ottawa & Chippewa Indians

DANIEL RAAS
RAAS, JOHNSON, GARRETT & STUEN
1503 E. Street, Box 5746
Bellingham, WA 98227
(206) 647-0234

Attorney for the Lummi Tribe

AMY CREWDSON
PO Box 189
Taholah, WA 98587
(206) 276-8211

Attorney for the Quinault Indian Nation

DANIEL T. GREEN
206 Greenough Street
Sault Ste. Marie, MI 49783
(906) 635-6050

Attorney for the Sault Ste. Marie Tribe of Chippewa Indians

RICHARD WEST
GOVER, STETSON & WILLIAMS,
1225 Rio Grande Blvd., N.W.
Albuquerque, NM 87104-2630
(505) 842-6961

Attorney for the Shoshone Tribe of the Wind River Reservation

ALLEN H. SANDERS
BELL & INGRAM
PO Box 1769
Everett, WA 98206
(206) 258-6261

Attorney for the Tulalip Tribes

JAMES BOTSFORD
Legal Aid Society
PO Box 37
Walthill, NE 68067
(402) 846-5380

Attorney for the Winnebago Tribe of Nebraska

JACK TROPE
Association on American Indian Affairs
95 Madison Avenue
New York, NY 10016
(212) 689-8720

Attorney for the Association on American Indian Affairs